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April 13, 2006

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case:	Personnel Security Hearing
Date of Filing:	May 20, 2005
Case Number:	TSO-0248

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization (or "security clearance") under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should be granted.

I. Background

The individual is employed by a DOE contractor. The contractor requested access authorization for the individual, but a background investigation uncovered information regarding past alcohol use that created a security concern. In order to resolve that concern, DOE conducted a Personnel Security Interview (PSI) with the individual in October 2004. In November 2004, a DOE consultant-psychiatrist evaluated the individual and opined that the individual drinks alcohol habitually to excess.

In April 2005, DOE informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his eligibility for access authorization. Notification Letter (April 26, 2005). The Notification Letter stated that the derogatory information regarding the individual falls within 10 C.F.R. § 710.8 (j) (Criterion J). The DOE Operations Office invoked Criterion J on the basis of information that the individual has been or is a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist, or other licensed physician or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse. 10 C.F.R. § 710.8 (j). In this regard, the Notification Letter cites the opinion of the DOE consultant-psychiatrist that the individual has been a user of alcohol habitually to excess, most recently in 2004.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the DOE consultant-psychiatrist (DOE psychiatrist) testified on behalf of the agency. The individual testified on his own behalf and also elected to call his wife, six colleagues and a forensic psychiatrist

as witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." Documents that were submitted by the individual during this proceeding are also exhibits to the hearing transcript and shall be cited as "Indiv. Ex."

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should be granted because I conclude that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

The DOE conducted a PSI with the individual to clarify some issues that arose during his background investigation regarding his alcohol use. PSI at 13. According to the individual, he began drinking alcohol periodically while he was in high school. After age 21 he drank more frequently--from two to four weekends per month. *Id.* at 16, 77. From age 21 to age 25 (1990-1994), he would drink three or four beers on weekends, but some months he did not consume any alcohol. *Id.* at 81. Between 1994 and 1997, he drank often when he was away from home on business, but usually only two to three beers at a time because he

had to drive. *Id.* at 84. However, he would get “intoxicated” five to six times per year.¹ In 1999, the individual moved out of state, where he would “binge” drink once every month or two, by drinking a 12-pack of beer. This continued until he met his current wife in 2000. *Id.* at 88-89. They began living together in 2001, and the individual then reduced his drinking to once a week, usually between the hours of 6 pm and 2am, when he would consume up to eight beers while playing an online computer game. *Id.* at 93-94. He admitted consuming ten beers on one recent night around the time of the PSI. *Id.* at 83. While playing the game, he would consume part of a can, toss it, and then open another.

The individual’s description of his drinking was not consistent during the PSI. He also explained to the interviewer that he was nervous, that his responses may have seemed sarcastic, and that he used levity to control his nervousness. PSI at 106. According to the individual, alcohol has not caused any problems in his marriage. *Id.* at 103.

During the PSI, the individual agreed to a psychiatric evaluation by a DOE psychiatrist. PSI at 107. A DOE consultant-psychiatrist evaluated the individual in November 2004. The doctor sent the individual for laboratory tests, but there was no laboratory evidence that the individual drank habitually to excess. Report at 21. After an interview, the psychiatrist concluded that he was not able to reach a diagnosis of alcohol dependence, mainly because the individual had no alcohol-related problems. Report at 20. The individual only met two of the three required criteria for a diagnosis of alcohol dependence, Criteria 1 and 5. *Id.* Nonetheless, based on the individual’s own account of his drinking, the psychiatrist opined that the individual drank habitually to excess without adequate evidence of rehabilitation or reformation. The psychiatrist also concluded that if the individual’s case proceeded to administrative review, the individual would then meet the required criteria for a medical diagnosis of alcohol dependence.² *Id.* There was no evidence that the individual had ever suffered from alcohol abuse. *Id.* at 21. In order to show adequate evidence of rehabilitation from drinking habitually to excess, the psychiatrist recommended in his report that the individual either: (1) attend Alcoholics Anonymous (AA) with a sponsor at least once a week for a minimum of 100 hours in a year and abstain from alcohol for two years; or (2) complete a six month alcohol treatment program and abstain for two years. *Id.* In order to demonstrate reformation from alcohol dependence, the DOE psychiatrist recommended that the individual abstain from alcohol for three years. *Id.* at 30.

B. DOE’s Security Concerns

The excessive use of alcohol raises a security concern because of its intoxicating effect. “Because the use of alcohol at the very least has the potential to impair a user’s judgment and reliability, individuals who use alcohol to excess may be susceptible to being coerced or exploited to reveal classified matters. These security concerns are indeed important and have been recognized by a number of Hearing Officers in similar cases.” *Personnel*

¹ The individual defined intoxication in the PSI as slurred speech and stumbling. PSI at 96-98.

² According to the psychiatrist, if the case proceeded to administrative review, the individual would then meet Criterion 6 for alcohol dependence (an important occupational activity is given up or reduced because of substance use). Report at 20. This would provide the third required criterion for a diagnosis of alcohol dependence.

Security Hearing, OHA Case No. VSO-0417, 28 DOE ¶ 82,798 (2001), quoting *Personnel Security Hearing*, OHA Case No. VSA-0281, 27 DOE ¶ 83,030 at 86,644 (2000). In this case, a DOE psychiatrist opined that the individual is drinking alcohol habitually to excess. Therefore, DOE's security concerns are valid and the agency has properly invoked Criterion J in this case.

C. Hearing Testimony

1. The DOE Psychiatrist

The DOE psychiatrist testified that he had reviewed the individual's file prior to the November 2004 interview, then sent the individual to a laboratory for tests and used the *Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition TR* (DSM IV) in order to search for a diagnosis. Tr. at 38-40. After analyzing this information, however, the psychiatrist could not find that the individual met any three of the seven criteria required for a psychiatric diagnosis of alcohol dependence. *Id.* at 39. In fact, he found that some of the criteria were weak. *Id.* Nonetheless, using an arbitrary definition (that anyone who is intoxicated four or more times a year is "drinking habitually to excess"), the DOE psychiatrist opined that the individual had been drinking habitually to excess without adequate evidence of rehabilitation or reformation in the past and was currently doing so. *Id.* at 42-49. The psychiatrist based this opinion on the individual's self-reported information that he was "intoxicated" three or four times in 2004 and five or six times per year between 1994 and 1997. *Id.* at 44-45. The psychiatrist also concluded that the individual is in denial about his alcohol problem. *Id.* at 51. The psychiatrist also testified that because the individual's case has proceeded to a hearing, the individual now technically meets the criteria for alcohol dependence. *Id.* at 50. The psychiatrist admitted that he did not include any favorable information in his report, even though the record of the individual's background investigation contained positive information about the individual's alcohol use. *Id.* at 53-54.

2. Other Witnesses

As evidence of rehabilitation and reformation, the individual presented the testimony of his wife, a forensic psychiatrist, and six colleagues.

The individual's wife testified that she met the individual in 2000, and at that time, he would typically drink three or four beers at a social event if he was not driving. Tr. at 10-12. They began living together in December 2001, moved to their current home in 2002, and married in 2003. *Id.* at 17. Since 2002, however, the individual has reduced his drinking to only one beer if they are out socially. *Id.* at 21. He does, however, drink at home during the evenings while he plays online computer games. *Id.* at 15. According to his wife, he opens several cans during an online session, but does not drink the entire can. She has observed the individual while they play the game together because their computers are in the same room. *Id.* at 15-16. In addition, she cleans the house and testified that the trash can in the computer room always contains cans with beer still in them, something that annoys her because she has to pour out the cans before putting them into the trash. *Id.* at 15. She believes that he does not finish the beers because he is concentrating on the

game. *Id.* The wife denied that the individual's drinking was a problem, and was actually more concerned about his smoking. *Id.* at 22. She testified that the individual was a good husband and that she did not think he had a drinking problem. *Id.* at 23.

All of the colleagues testified that they have never seen the individual impaired or intoxicated. Tr. at 69, 80, 96-97, 106, 115, 121. They all described him as a good worker. *Id.* at 66-122. One of the colleagues actually plays the computer game with the individual. This witness testified that he has known the individual for four years and during that time has never seen him drink more than one or two beers at a time. *Id.* at 79-83. He last saw the individual drink alcohol four or five months prior to the hearing. The colleague gave a very detailed explanation of the game during the hearing. He explained how the game is very complex and requires all of the players' faculties. Game players create a character with special abilities. The game requires that players remember certain things whenever they play the game, e.g., how to perform certain required functions, the roles of other characters in the game. The characters in the game rely on each other for certain things (e.g. healing, support, etc.) and cannot continue to progress in the game without the cooperation of the other players. *Id.* at 90-92. During the game, players chat with each other through the chat window. The witness testified that a player cannot play the game, with all of the complexities and dexterity required, while impaired. Sessions last from two to eight hours and he can tell if a person is impaired by noticing misspellings, delays, and general odd activity on the computer screen. The witness testified that he has never observed impairment of any kind in the individual's playing of the game. *Id.* at 87-90.

The forensic psychiatrist testified about the individual's alcohol consumption. In order to evaluate the individual, the forensic psychiatrist first read the DOE psychiatrist's report, and then conducted a two-hour psychological evaluation of the individual. The forensic psychiatrist agreed with the DOE psychiatrist that there was no psychiatric diagnosis. However, the forensic psychiatrist specifically disagreed with the DOE psychiatrist's application of two criteria -- Criterion 5 (that the individual spent a great deal of time in activities necessary to obtain the substance) and Criterion 7 (use in spite of a health problem). The forensic psychiatrist argued that even though the individual did most of his drinking while playing the computer game, he did not spend long periods of time at the game as an excuse to drink alcohol. Tr. at 126-129. Further, the forensic psychiatrist opined that the individual did not have a serious health problem that was aggravated by alcohol, such as diabetes. Rather, the individual was merely overweight but not obese or morbidly obese. *Id.* at 139-140. The forensic psychiatrist was present during testimony about the online computer game and explained that he did not appreciate the complexity of the game until he heard the friend's testimony. He therefore concluded that even though the individual drinks while he plays a very complex game that requires quick decisions, he does not appear to be impaired while playing the game. The forensic psychiatrist argued that risk assessment must have a connection to a psychiatric diagnosis or it is outside the realm of psychiatric expertise. There was no psychiatric definition of "habitual." *Id.* at 127. Thus, he was reluctant to give an opinion on the risk associated with the individual holding a security clearance in the absence of a psychiatric diagnosis.

The forensic psychiatrist interpreted the individual's self reports of alcohol use in a different manner from the DOE psychiatrist. He asked the individual how many six packs he

consumed weekly, and concluded that his consumption had not increased substantially over time. Tr. at 145. He did, however, find indications of problems with alcohol. Nonetheless, the forensic psychiatrist testified that he could not opine that the individual drank habitually to excess. *Id.* at 148-150. He looked at the definition of “substance intoxication” in the DSM-IV, which included problems with belligerence, mood lability, or cognitive impairment related to alcohol use and concluded that the individual did not present with any of these qualities. *Id.* at 151. The forensic psychiatrist found that the individual’s last intoxication was October 2004, the night of his grandfather’s funeral, but that intoxication lasted for a short period of time. *Id.* at 153. Thus the forensic psychiatrist concluded that the individual was not drinking habitually to excess, nor was he alcohol dependent or suffering from alcohol abuse.

3. The Individual

At the hearing, the individual disputed the DOE psychiatrist’s account of the individual’s alcohol consumption. For instance, he denied saying that he had consumed eight to ten drinks in one day at any time in 2004. The individual explained some of the discrepancies by explaining that he was frustrated and annoyed by the personnel security specialist (who interviewed him during the PSI) and the DOE psychiatrist, who the individual felt was condescending. Tr. at 158-159. The individual testified that he was frustrated because the DOE psychiatrist and the personnel security specialist were trying to “pin him to a number” of drinks and he could not be accurate. *Id.* at 158. The individual admitted that in the past he drank while he played his online computer game, but argued that he has not had more than two or three beers since June 2005, approximately five months prior to the hearing. He continues to drink, but less than before. He does not think he has a problem with alcohol. The individual testified that he opens many cans of beer while playing his game, but does not drink them empty, explaining “I don’t sit down to drink to get drunk, I sit to play my game.” *Id.* at 160. After the interview with the forensic psychiatrist, he has reduced the amount of time he spends playing the game and drinking in order to spend more time with his family. *Id.* at 163-164.

D. Mitigation of the Security Concern

There is conflicting expert testimony in this case. The DOE psychiatrist has concluded that the individual drinks habitually to excess without adequate evidence of rehabilitation or reformation. The forensic psychiatrist, on the other hand, contends that the individual does not drink habitually to excess. After reviewing their testimony and the record of this case, I find the arguments of the forensic psychiatrist more persuasive for several reasons. First, the DOE psychiatrist used an arbitrary definition of “drinking habitually to excess” – anyone who is intoxicated four or more times per year. However, the DOE psychiatrist did not offer a persuasive reason for his definition. “Excess” is defined in Webster’s II New Riverside University Dictionary (1988) as “an amount beyond the normal, sufficient, required, or appropriate.” There is no evidence in the record that the individual has a pattern of drinking an abnormal or inappropriate amount of alcohol on a regular basis. In addition, the record in this case contains different accounts of the amount of alcohol the

individual drinks.³ Second, all of the information in the record about the individual's alcohol use was self-reported. Close observation of the individual at the hearing corroborated his statements in the PSI and his testimony during the hearing that he tended to be sarcastic when he was nervous. Unfortunately, this was not helpful in discovering the exact amount of consumption. Thus, it is difficult to rely on the individual's definition of intoxication, his recollection of how much he drank and how often he was "intoxicated" -- another imprecise and unscientific definition. Third, the testimony of the individual's wife supported the findings of the forensic psychiatrist that the individual was not drinking to impairment while playing his computer game. The individual's wife was very credible as she described his drinking habits at home as coincidental to his online game play. Her account of the individual's drinking habits while playing the game corroborated the individual's insistence that he drank while playing the game, and did not play the game as an excuse to consume alcohol. She had no problem with the individual's alcohol consumption and considered him a good husband. Fourth, both medical experts agreed that prior to the hearing the individual's drinking did not meet the criteria for a psychiatric diagnosis of alcohol dependence. The DOE psychiatrist diagnosed the individual as alcohol dependent only because the case went to hearing, and even then admitted that this most recent criterion was "weak." Tr. at 40. Finally, and most important, there is no evidence in the record of any negative alcohol-related incidents in the individual's past. The individual has had no alcohol-related legal problems, whether related to driving, his marriage, or his job.⁴ Both psychiatrists considered this a key fact in explaining their conclusions that they could not make a psychiatric diagnosis of any alcohol disorder prior to the hearing.

I have considered the conflicting expert testimony presented on this matter. Unlike a medical diagnosis of alcohol abuse or alcohol dependence, I need not defer to the opinion of the DOE psychiatrist with respect to the ultimate issue here—whether the individual is an unacceptable security risk. This is particularly true where, as here, more compelling evidence contradicting a medical diagnosis of an alcohol problem is presented. See e.g., *Personnel Security Hearing*, Case No. VSO-0537 (September 10, 2003); *Personnel Security Hearing*, Case No. TSO-0236, 29 DOE ¶ 82,880 (2005). As stated above, I find the forensic psychiatrist's testimony more convincing for the reasons noted. In addition, there was no persuasive evidence in the record that the individual drank or is drinking habitually to excess. Thus, I conclude that the individual has successfully mitigated the security concerns in this case.

II. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (j). However, the individual has presented adequate mitigating factors for this criterion that alleviates the legitimate security concerns of the DOE Operations Office. In view of this criterion and the record before me, I find that granting the individual's access authorization would not endanger the common defense and security and would be

³ I note that the individual told the DOE psychiatrist that he was intoxicated three or four times per year in 2004.

⁴ Prior to the administrative review process, the individual had not experienced any job-related problems from his alcohol use.

consistent with the national interest. Accordingly, I find that the individual should be granted access authorization. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: April 13, 2006